***

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No. 338 of 2004
Date of decision: 17.9.007

Sunil Sardana **...Petitioner**

Versus

Renu Rawal **...Respondent**

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. O.P. Goyal, Senior Advocate with
Ms. Priya Khurana, Advocate for the petitioner.

Ms. Jyoti Chaudhary, Advocate for the respondent.

****

RAJESH BINDAL, J.

Petitioner/plaintiff has approached this Court praying for quashing of order dated November 24, 2003, passed by the Civil Judge (Senior Division), Gurgaon whereby application filed by the brother of respondent/defendant under Order 32 Rule 15 of the Code of Civil Procedure (for short "the Code"), was accepted. It was held that respondent/defendant was suffering from unsoundness of mind, resultantly was unable to protect her own interest, while defending the suit. Brother of the respondent-defendant, namely, Yogesh Rawal was appointed as guardian to contest the suit on behalf of respondent/defendant.

Briefly the facts of the case, are that the respondent/defendant entered into an agreement to sell plot No. A-538-B measuring 350 sq. yards situated in Sushant Lok, Gurgaon. The agreement to sell was executed on February 2, 1994 for a total consideration of Rs. 4,50,000/-. A sum of Rs. 25,000/- was paid as earnest money at the time of execution of the agreement, partly in cash and partly by cheque. In the first week of March, petitioner/plaintiff requested the respondent/defendant to get the plot in question registered in his name. Thereafter, on March 16, 1994 a public notice was issued in the Hindustan Times by the petitioner/plaintiff to the

***

effect that plot in question was agreed to be sold by the respondent/defendant to the petitioner/plaintiff and anybody dealing in the same would be doing so at his own risk and responsibility. On March 21, 1994, petitioner/plaintiff served a legal notice on the respondent/defendant requesting her to execute the sale deed after getting the income tax clearance certificate within fifteen days from the date of notice. The same was duly served upon the respondent/defendant. However, sale deed was not executed. Under the circumstances, petitioner/plaintiff filed civil suit for possession by way of specific performance of the agreement to sell dated February 2, 1994. Notice of the suit was served upon the respondent/defendant. Thereafter, on October 10, 1994, Yogesh Rawal brother of respondent/plaintiff filed an application under Order 32 Rule 7 read with 151 of the Code for substituting his name as against the respondent/defendant. It was, inter-alia, contended in the application that the respondent/defendant was sick and was in mental depression. She was suffering from disturbed state of mind for the last more than one year. The allegations made by Yogesh Rawal were denied by the petitioner/plaintiff in reply filed thereto. The application was withdrawn by Yogesh Rawal and thereafter another application was filed by him under Order 32 Rule 15 of the Code for his appointment as guardian ad-litem on the ground that respondent-defendant was sick for the last more than two years. In reply to this application, petitioner/plaintiff refuted the allegations made therein. Learned trial Court framed issues and after recording the evidence of the parties accepted the application made by Yogesh Rawal by permitting him to represent the respondent/defendant to protect her interest. It is this order, which is impugned in the present revision petition.

I have heard learned counsel for the parties and with their assistance have perused the material on record.

Shri O.P. Goyal learned Senior Counsel appearing for the petitioner/plaintiff submitted that due procedure for declaring the respondent/defendant of unsound mind has not been followed by the Court below as what to talk of the other sufficient evidence on record even the respondent/defendant was not called in person in the Court for recording her

***

statement. There is otherwise also contradictions in the evidence led by the brother of the respondent/defendant to prove that respondent/defendant was of unsound mind. The only object was to come out of the agreement to sell for the simple reason that after respondent-defendant had entered into agreement to sell, the prices of the property have increased. He further relied upon the judgments in **Duvvuri Rami Reddi Vs. DuvvuduPapi Reddi and others AIR 1963 Andhra Pradesh 160, Somnath Vs. Tipanna Ramchandra Jannu AIR 1973 Bombay 276** and **Asha Rani Vs. Amrat Lal AIR 1977 Punjab & Haryana 28.** Accordingly, the prayer made is that the order passed by the Court below deserves to be set aside.

On the other hand, Ms. Jyoti Chaudhary, learned counsel appearing for the respondent/defendant submitted that sufficient material is on record in the form of statement of Doctor, who had been treating the respondent/defendant to show that she is of unsound mind and was unable to defend herself in the suit filed against her. It was further submitted that doctor can be the best person to depose as to whether a person is of sound mind or not and his opinion on issue has rightly been relied upon by the Court below to accept the prayer made by the brother of the respondent/defendant.

After hearing the learned counsel for the parties and consideration of the material on record, it is noticed that respondent/defendant was never summoned by the Court to record her statement to observe itself about the state of mind of the respondent/defendant in the light of the evidence produced to prove her to be of unsound mind. It cannot be denied that it is not the question of the decision of the lis in the present proceedings only that the respondent/defendant had been declared to be of unsound mind by the Court below rather it has far reaching consequence and the approach of the Court in such a matter has to be quite cautious unless convincing evidence is available on record such a drastic action should not be taken.

Dr. A. Mukarjee was produced by Yogesh Rawal to prove that defendant/respondent had remained under treatment with him from 1992. However, no follow up action after April 25, 1992 was produced by

***

him. The prescription slips issued by him thereafter in September and November, 1992 were merely marked in the evidence and not exhibited. Dr. Mukarjee in his examination-in-chief has identified the prescription slips issued by other Dr. Subir Bal stating him to be his class mate in Medical College. However, in cross examination, he admitted that after 1973, he never remained together with Dr. Bal. She never remained an indoor patient. In his statement, Yogesh Rawal stated that his sister was living with him and was mentally unwell ever since 1988-89 and is under treatment of Dr. Mukarjee. She was unable to take any independent decision.

On the other hand, petitioner/plaintiff produced evidence to show that the respondent/plaintiff had opened bank account on April 29, 1992, which was closed on April 13, 1993, an agreement to sell dated February 3, 1993 was proved as Ex. RW3/1 and another bank account maintained by respondent, which was closed on February 12, 1996.

In Asha Rani's case (supra), this Court held as under:-

"3. A study of the language of Rules 3 and 15 of Order XXXII of the Code quoted above makes it manifest that the provisions of Rule 3 of Order XXXII of the Code are mandatory and the appointment of a guardian is not a mere formality.

4. Any proceedings recorded or the decree passed against a minor or mentally unsound defendant without the appointment of a guardian by the Court in the light of the above-quoted provisions would be void because of the contravention of the mandatory provisions of law. Rule 15 of Order XXXII of the Code is explicit and postulates an inquiry into the unsoundness of mind of a person who sues or is being sued as a person of unsound mind. It casts a duty on the Court to hold such an inquiry and reach a definite conclusion that the allegation is well founded. However, the inquiry required by the rule need not be elaborate but is to be

***

only of a preliminary nature. The Judge can satisfy himself on the basis of the affidavits, examination of the person alleged to be of unsound mind in his chamber or can ask the assistance of a medical expert. The Judge can even compel the mentally infirm party to attend the Court for deciding the question whether such a person is incapable of representing his case. After this inquiry the Court has to resort to the procedure of appointment of a guardian in the case of a person of unsound mind."

In Duvvuri Rami Reddi's case (supra) Andhra Pradesh High Court, while referring to various decisions summarized the principles emerging therefrom in the following terms:-

"22. From these decisions, the following principles emerge:

(1) Order XXXII, R.15 C.P.C. places persons of unsound mind or persons so adjudged in the same position as minors for purposes of Rr. 1 to 14.

(2) Order XXXII R. 15 C.P.C. applies not only to a person adjudged to be of unsound mind, as under the old Code, but also to a person of weak mind.

(3) where it is alleged that a party to a suit is of unsound mind, and the other party denies it, the Court must hold a judicial inquiry, and come to a definite conclusion, as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit.

(4) Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication, or of communicating his wishes or thoughts to others.

(5) Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the extent of the infirmity has to be found by the Court on inquiry.

(6) Where the question of unsoundness of mind arises not

***

only under O.XXXII, R. 15 C.P.C. But is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question, and for that purpose seek medical opinion.

(7) The enquiry should consist not only of the examination of the witnesses produced by either party, but also of the examination of the alleged lunatic by the judge, either in open court or chambers, and as Courts are generally presided over by lay-men, as a matter of precaution, the evidence of medical expert should be taken.

(8) Of course, the opinion, of a doctor, as is the opinion of any other expert, under Sec. 45 of the Evidence Act, is only a relevant piece of evidence.

(9) The Court may also compel the attendance of the alleged lunatic before it, and to submit himself for medical examination. If the alleged lunatic is in custody, the Court may direct the next friend or any other person having custody to produce him before the medical expert for examination.

(10) Where the precaution of judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.

(11) When a person is adjudged a lunatic irregularly and improperly, and notice was not served on him, and a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an ex parte decree, and have it set aside under O. IX R. 13 C.P.C."

The Court further opined that decision under Order 32 Rule 15 of the Code is one fraught with serious consequences as it results in the rights of a party to conduct his own litigation being taken away, and guardianship of another forced upon him.

***

The Bombay High Court in Somnath's case (supra) while dealing with the issue held as under:-

"8. Rules 1 to 14 of Order 32 deal with the procedure to be followed when the plaintiff or the defendant is a minor. In the case of plaintiffs and defendants who may be persons of unsound mind the procedure is laid down in Rule 15 of Order 32 which is as follows:-

> " The provisions contained in Rules 1 to 14, so far as they are applicable shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued."

The above rule contemplates two kinds of cases. Where a person is already adjudged to be of unsound mind as under the Lunacy Act, that would be the first category of cases of persons of unsound mind which are covered by Rule 15. However, there may be persons of unsound mind who are not so adjudged by the court. How shall a suit be filed on their behalf; or how shall such persons defend the suit filed against them? The second part of the provision of rule 15 quoted above shows that in case of such a person who is not already adjudged a person of unsound mind, the court, on inquiry, has to find out that by reason of unsoundness of mind or infirmity, the person concerned is incapable of protecting his interest when suing or being sued. Once this finding is arrived at the provisions of Rules 1 to 14, so far as they may be applicable automatically get extended to the persons of this type.

9. The plaintiff in the present suit is not already adjudged

***

to be of unsound mind. The case of the present plaintiff obviously falls under the second part of rule 15. In the case of such a plaintiff, the court has to find on inquiry whether he is in fact so. At what stage this should be done and in what manner, is not prescribed by any part of Order 32 or by any other provisions of the Code of Civil Procedure."

17. The above discussion clearly leads to the logical conclusion that when the plaint is being examined for the purpose of admission, if it contains a statement as required by clause (d) of Rule 1 of Order 7 that the plaintiff is a person of unsound mind and that a next friend is suing on his behalf, the not necessary for the next friend to make a separate application for that purpose. This inquiry should ordinarily include the calling of the plaintiff himself and questioning him in Court. If the Court entertains doubt about the mental capacity or the soundness of his mind, it is open to the Court to take further assistance in the form of medical examination and the evidence of the doctor under whose observations the plaintiff may be kept. The quantum and extent of inquiries must be left in each case to the circumstances prevailing. There may be a plaintiff who on immediate view may appear to be a person of unsound mind and the Court may not need much evidence beyond recording of the questions put to and the answers given by the person concerned. There can be other cases which are not so clear and more evidence may be necessary. However, apart from the total extent of the evidence that might be led, we would suggest that as a matter of strong common sense approach, the plaintiff who is alleged to be of unsound mind should be invariably called for being questioned when the case

***

> falls under the second part of Rule 15 of Order 32. This inquiry is made "for the purpose of recording a finding by the court that the plaintiff is a person of unsound mind, or a person mentally so infirm as to be incapable of protecting his own interests. The provisions of Rule 15 of Order 32 make it possible for a next friend to sue on behalf of an adult person as a next friend only when the person is either so adjudged by a court of competent jurisdiction or if not so adjudged, is found by the court on inquiry to be so. That is the foundation, prima facie, for a next friend to avail and proceed with the suit. Such inquiry is obviously an ex parte inquiry for the court to give a finding and to admit the plaint and issue the process to the other side."

In **Smt. Godawari Devi Vs. Smt. Radha Pyari Devi and others AIR 1985 Patna 366**, it has been held that the issue regarding declaration of a party to be of unsound mind is between the Court and the party and is not a lis between the parties themselves. The following observations can be referred for the purpose:-

> "The issue of unsoundness of mind of the parties is primarily betwixt the Court and the party and is certainly not a lis betwixt the parties themselves. The legislature in its wisdom has conferred a larger and paternal power on the court to see that each party has the capacity to safeguard its legal interest and is in no way handicapped by reason of any mental infirmity. It is equally significant to notice that this broad based power extends in cases of any mental infirmity and is not necessarily governed by the extreme situation of a person being of unsound mind altogether. This beneficial and, indeed, paternal power is wholly vested in the court and it is in its discretion alone, where it finds that any one of the parties is suffering from a weakness of mind, to proceed for taking steps to safeguard the interests of such a party."

***

In **Shakunthala Devi Vs. K. S. Naidu and another AIR 2005 Madras 56** while referring to earlier Division Bench judgment of the same Court in **Parvathi Ammal Vs. Kamalammal (2003 (3) CTC 404),** it was held as under:-

> "As per Order XXXII, Rule 15, CPC, persons of unsound mind or persons so adjudged in the same position as minors for the purpose of Rules 1 to 14 (except Rule 2A) and for that purpose, the trial Court should examine the alleged lunatic either in open Court or in Chambers and in the presence of the medical expert. The trial Court has got ample power to compel the attendance of the alleged lunatic, viz., plaintiff, before it and to submit herself for medical examination."

In a matrimonial dispute with the allegations of one of the parties being unsound mind and suffering from schizophrenia, a Division Bench of the Rajasthan High Court had summoned the parties in person and examined themselves as is recorded in the judgment reported as **Smt. Sunita Sajnani Vs. Ratan Kumar 1 (1999) DMC 154.**

Kerala High Court in **Marci Celine D'Souza and another Vs. Renie Fernandez and others AIR 1998 Kerala 280** opined in the following terms in para 7 of the Judgment:-

> The Court is not expected to conduct an elaborate enquiry under Order XXXII, Rule 15 of the Code of Civil Procedure. Before a next friend can represent a person incapable of protecting his rights it is not necessary that there should be a preliminary enquiry and a finding that person by reason of unsoundness of mind or mental infirmity is incapable of protecting his interests. All that is needed is that there must be some prima facie proof such as to satisfy the Court that the person was by reason of infirmity incapable of protecting his interest, because an order permitting the next friend to represent such a person is not final. It is always open to the defendants to take out another application to have the order revoked when the Court can fully go into the matter."

***

In the above case, on the consideration of medial evidence produced on record, the Court came to the conclusion that person concerned therein was critically ill and mental infirm, accordingly, was found not able to protect his interest.

The following passages from the judgment of Hon'ble the Supreme Court in **Sharda Vs. Dharam Pal 1 (2003) DMC 627,** where the issue in question was as to whether the matrimonial Court has power to order a person to undergo medical test, are also quite useful:-

> "26. The Court, however, indisputably is empowered to satisfy itself as to whether a party before it suffers from mental illness or not either for the purpose of appointment of a guardian in terms of Order 32 Rule 15 of the Code of Civil Procedure or Section 41 of the Indian Lunacy Act as also for the determination of his competence as a witness.
>
> 49. We wish to point out that the question as to whether a person is mentally ill or not although may be a subject-matter of litigation, the Court having regard to the provisions contained in Order 32 Rule 15 of Code of Civil Procedure, Section 41 of the Indian Lunacy Act as also for the purpose of judging his competence to examine as a witness may issue requisite directions. It is, therefore, not correct to contend that for the aforementioned purposes the Court has no power at all. The prime concern of the Court is to find out as to whether a person who is said to be mentally ill could defend himself properly or not. Determination of such an issue although may have some relevance with the determination of the issue in the *lis*, nonetheless, the Court cannot be said to be wholly powerless in this behalf. Furthermore, it is one thing to say that a person would be subjected to test which would invade his right of privacy and may in some case amount to battery; but

***

> it is another thing to say that a party may be asked to submit himself to a psychiatrist or a psychoanalyst so as to enable the Court to arrive at a just conclusion."

In Asha Rani's case (supra), this Court had already opined that Order 32 Rule 15 of the Code casts a duty on the Court to hold an enquiry and reach to a definite conclusion that the allegations regarding the unsoundness of the mind of the person are well founded. The Judge can satisfy himself on the basis of affidavits, examination of the person alleged to be of an unsound mind in his chamber or can ask the assistance of a medical expert. The presence of the person concerned can also be sought. It is only after this convincing enquiry that an order for appointment of a guardian required to be passed. Similarly in Duvvuri Rami Reddi's case, (supra) Andhra Pradesh High Court had also opined that the enquiry should consist not only of the examination of witnesses produced by either party, but also examination of the alleged person of unsound mind. As a matter of precaution, the evidence of medical expert can also be taken. Bombay High Court also in Somnath's case (supra) opined that such an enquiry should ordinarily include the calling of the person concerned and in case some doubt is entertained about his mental status, further medical assistance may be taken. The quantum and extent of enquiry is need based keeping in view the facts and circumstances of the case. The Patna High Court in Smt. Godawari Devi's case (supra) opined that issue of unsoundness of mind is primarily between the Court and the party and not a lis between the parties. Once that is so, more duty and burden is cast on the Court to see that there is sufficient material to hold the person of unsound mind as it has very serious ramification. Madras High Court also in Shakunthala Devi's case (supra), which was referred to a judgment in Parvathi Ammal's case (supra) by the same Court also opined that the Court should examine the alleged lunatic person either in the Court or the Chamber and in presence of medical expert.

The crux of the opinions expressed by various Courts on the issue, where a person is to be declared of unsound mind, is that he/she should be examined by the Court either in open Court or in the Chamber and in case need be the advice of medical expert should be taken and further

***

that an order passed under Order 32 Rule 15 of the Code is not final for all times to come as the other party can always move an application in the changed circumstances.

If the facts of the present case are examined in the light of the judicial pronouncements referred to above, it is found that barring the evidence of brother of respondent and Dr. Mukarjee no other material is on record to prove that respondent is of unsound mind. The respondent was not even summoned by the Court in person. No independent medical opinion was taken. All what Dr. Mukarjee could prove was that the respondent was under his treatment in 1992. Thereafter, it is a prescription issued by another Dr. Subir Bal, which was sought to be proved by Dr. Mukarjee by recognizing his signature on the plea that he was his classmate. In my opinion, due and proper procedure has not been followed by the Court below to hold that respondent is of unsound mind requiring the appointment of Guardian to safeguard her interest in the suit.

Accordingly, while setting aside the impugned order, I remit the case back to the trial Court for fresh consideration of the application in the light of the observations made above.

The revision petition is disposed of in the manner indicated above with no order as to costs.

September 17 , 2007 **(Rajesh Bindal)**
Pka **Judge**

(Refer to Reporter)

***